

December 3, 2019

The Honorable Jesse M. Furman
Thurgood Marshall U.S. Courthouse
U.S. District Court for the Southern District of New York
40 Centre Street, Room 2202
New York, NY 10007

RE: Motion for Leave to File Sur-reply in Support of Sanctions in
State of New York, et al. v. U.S. Dep't of Commerce, et al., 18-CV-2921 (JMF)

Dear Judge Furman:

The New York Immigration Coalition Plaintiffs ("NYIC Plaintiffs") respectfully submit this letter pursuant to the Court's Order dated November 26, 2019, ECF 670.

Defendants' Letter to Plaintiffs dated November 25, 2019 ("Defendants' Letter") and the accompanying newly-produced documents, *see* ECF 669-1, establish four critical points.

1. Defendants have acknowledged that their document productions may still be incomplete as of today, more than one year after the end of trial. *See id.* at 2 (acknowledging possibility that, beyond latest untimely-disclosed documents, "other documents were similarly inadvertently omitted from production"). While the Federal Rules governing discovery "do not require perfection," Defs.' Sur-Reply in Opp. to Sanctions ("Defs.' Surreply"), ECF 667, at 6, they certainly impose "'a heightened duty of candor.'" *Jianjun Chen v. 2425 Broadway Chao Rest., LLC*, 331 F.R.D. 568, 571 (S.D.N.Y. 2019) (quoting *Kosher Sports, Inc. v. Queens Ballpark Co., LLC*, No. 10-cv-2618, 2011 WL 3471508, at *7 (E.D.N.Y. Aug. 5, 2011)). This is not Defendants' first omission. Far from it.

2. Defendants neither affirmatively disclosed their previously-discovered omissions nor willingly corrected them. Rather, Plaintiffs' motion for sanctions directly challenged the completeness of the productions from the custodians who are the subject of these untimely productions, while Defendants repeatedly insisted that these challenges were without merit, and only belatedly produced such materials.¹ Defendants' "aggressively willful . . . repeated representations of full production" over Plaintiffs' "repeated demonstrations of incomplete compliance" constitute evidence of sanctionable bad faith. *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees & Rest. Employees Int'l Union*, 212 F.R.D. 178, 221-22 (S.D.N.Y. 2003).

And Defendants now admit that several recently-discovered documents were, in fact, located on personal devices. Defs.' Surreply, ECF 667, at 3 (Gore), 5 (Davidson). This contradicts Defendants' previous assurances during discovery that searches of "personal devices or accounts" were unnecessary because "no custodians ha[d] responsive documents or communications that were not also present in their government email addresses." Ex. G, Email

¹ *See, e.g.*, NYIC Pls.' Mot. for Sanctions, ECF 635 & NYIC Pls.' Surreply in Support of Sanctions, ECF 665 (challenging completeness of productions from current Census Bureau Chief of Staff Christa Jones, Acting Assistant Attorney General for Civil Rights John Gore, and Commerce General Counsel Peter Davidson).

from Stephen Ehrlich, Aug. 10, 2018. *See also* Ex. H, Email from Kate Bailey, Aug. 15, 2018 (affirming “DOC employees are instructed to copy or forward to government email addresses any government communications sent or received from personal email addresses”).² In light of Defendants’ apparent misinformation to their own counsel (and to the Court), Defendants’ current assertion that no other relevant documents exist on their custodians’ personal devices, *see* Defs.’ Surreply, ECF 667, at 3, 5, is not sufficient.

3. Defendants’ belated production of documents from Christa Jones indicate that she played a larger role preparing Secretary Ross’s decisional memo than previously understood. As noted in the motion for sanctions, Census Bureau Chief Scientist John Abowd testified that Jones “communicated” the Census Bureau’s “suggestions” regarding a draft of Secretary Ross’s Decisional Memorandum to Commerce. *See* Ex. 27 to Pls.’ Mot. for Sanctions, ECF 635-1, at 172-73. While Defendants previously maintained that “[n]o evidence supports the claim that relevant communications of Christa Jones are absent from the administrative record,” Defs.’ Opp. Br., ECF 648, at 14, that was incorrect. The latest documents reflect that Jones received the draft memo directly from then-Commerce Deputy General Counsel (now Commerce Chief of Staff) Michael Walsh via email on March 25, 2018. *See* ECF 669-1 at 26. And while Dr. Abowd testified he believed that there “were no e-mail correspondences” regarding the Bureau’s suggestions, Ex. 27 to Pls.’ Mem. in Support of Sanctions, ECF 635-1, at 172-73, Jones in fact e-mailed comments (redacted on the basis of deliberative privilege) directly to Walsh on March 26, 2018. *See* ECF 669-1 at 20. Walsh then forwarded those comments to James Uthmeier in the Commerce General Counsel’s office. *See* ECF 669-1 at 1.

None of these documents (listed as nos. 1, 8, and 11 on Defendants’ latest Privilege Log, *see* ECF 669-1 at 3-4) were previously produced or even logged in this litigation despite being in the possession of multiple custodians, including Jones, Walsh, and Uthmeier. Because Jones has acknowledged she had many conversations about the citizenship question with Thomas Hofeller and his business partner Dale Oldham, *see* Pls.’ Surreply, ECF 665, at 2, her participation in this critical phase of drafting of the Decisional Memo is of significant interest in determining the true decisionmaking process and formulation of the VRA rationale.

As requested in the Motion for Sanctions, the Court should compel production of all documents reflecting Jones’ participation in the drafting over Defendants’ assertion of deliberative process (and any other) privilege. *See generally* ECF 635, at 28-30 & Exs. 46 & 47.³

² Exhibits to NYIC Plaintiffs’ initial motion for sanctions are designated sequentially by number, from Exhibits 1 to 49. *See* ECF 635-1 to 635-5. Exhibits to Plaintiffs’ Reply Brief are designated numerically by number, starting from Reply Exhibits 1 through 3. *See* Reply Exhibits, ECF 654-1 to 654-3. Exhibits to NYIC Plaintiffs’ Surreply and this Letter are designated sequentially by letter, from Exhibits A to H. *See* ECF 665-1 to 665-6, and attached Exhibits G and H.

³ NYIC Plaintiffs are submitting with this letter an updated version of Exhibit 46 to reflect Defendants’ latest production of additional Jones documents (which will be referred to as Exhibit 46A).

4. It is notable that each of the documents that Defendants conveniently claim “were inadvertently not produced in discovery,” Defs.’ Letter, ECF 669-1, at 1, bears directly on Defendants’ actual reasons for adding a citizenship question to the Census:

- First, documents referenced in NYC Plaintiffs’ original Motion for an Order to Show Cause indicated that Defendants’ VRA rationale was concocted by the preeminent gerrymandering expert Dr. Hofeller, and that Defendants’ true purpose in adding a citizenship question was the opposite of what they publicly claimed—*i.e.*, not to protect voting rights but to facilitate gerrymandering strategies “advantageous to Republicans and Non-Hispanic Whites,” NYC Pls.’ Letter Motion for an Order to Show Cause, ECF 595, at 1-2;
- Second, subsequently-discovered documents in Hofeller’s possession revealed that Hofeller had a long-standing relationship with: (1) Mark Neuman, Secretary Ross’s “trusted advisor” on census issues, who “act[ed] analogously to an agency employee,” Defs.’ Opp. to Mot. to Compel Neuman Documents, ECF 451, at 3; and (2) Jones, with whom Hofeller discussed the citizenship question on multiple occasions, *see* NYC Pls.’ Mot. for Sanctions, ECF 635, at 6;
- Third, documents from Mark Neuman, referenced in NYC Plaintiffs’ Surreply, revealed that Neuman obtained sign-off from Hofeller and Oldham on a draft DOJ letter requesting the citizenship question, which he then texted to the acting head of the Civil Rights Division, John Gore; and that following his meeting with Gore, Neuman texted the Commerce Department General Counsel Peter Davidson, *see* Pls.’ Surreply, ECF 665, at 2-4;
- Defendants’ latest production of documents from Jones shows that she played a significant role in reviewing Secretary Ross’s decisional memo, including sending comments to senior Commerce Department personnel that were in the possession of multiple custodians, but were never produced or logged, *see supra*.

This is important context for Defendants’ arguments about the number of pages that they actually produced. *See* Defs.’ Surreply, ECF 667, at 7. While Defendants produced tens of thousands of pages of documents, they also happened to “inadvertently” omit critical documents that connect the dots between their “contrived” VRA rationale, *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019), and a discriminatory scheme to facilitate the exclusion of noncitizens altogether from the redistricting process for the benefit of “Republicans and Non-Hispanic Whites,” Ex. 6 to Pls.’ Mot. for Sanctions at 9, ECF 635-1. Each time Defendants have been caught concealing these highly relevant documents, they have assured Plaintiffs and the Court that these were isolated mistakes and there are no other similar undisclosed documents lurking.

At a minimum, Defendants’ latest disclosures and their telling refusal to assure that all relevant documents have now been disclosed warrant a full, court-ordered accounting of Defendants’ search protocols, including: a comprehensive list of custodians searched; all accounts and devices searched (including personal devices); all search procedures and terms used for each custodian and account/device; the dates on which the searches were conducted; and

production of all litigation hold notices and document collection certifications. Defendants' accounting should also include a report as to why responsive documents were not produced in a timely manner; why relevant documents were omitted from production; and who was responsible for these failures.

For the reasons set forth in this letter, and in Plaintiffs' previous submissions, this Court should order sanctions of Defendants and Mark Neuman.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ Dale E. Ho

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Attorneys for the NYIC Plaintiffs

EXHIBIT 46A

EXHIBIT 46A

DOCUMENTS RELATED TO CHRISTA JONES' INVOLVEMENT -- AMENDED

(Blue—Only DPP Asserted; Green—Only AC/WP Asserted; Black—Both Asserted)

Category	Documents Numbers
Christa Jones' involvement in drafting the Ross Decisional Memorandum	AR 1479 , 1766, 2726 , 2765 , 2869 , 2681 , 2690 , 2877 , 2894 , 2916 , 4075, 4085, 4088, 4135 , 5577, 5605, 5608, 5783 , 5788, 5798, 5804, 5809, 5813, 5818, 5822, 5836, 5840, 5844, 5847, 5850, 5853, 5856, 5859, 5862, 5865, 7371, 11282 COM_DIS00019994, 19997, 20014, 20017, 20018, 20020, 20023, 20083, 20093 , 20094 , 20095 , 20096 , 20097 , 20098 , 20099 , 20127, 20137 , 20138 , 20139 , 20140 , 20142 , 20143 , 20144 , 20154 Defendants' Nov. 25, 2019 Supplement Log Items 1 , 1A, 2 , 8 . 8A, 11 , 11A
Christa Jones' efforts to secure administrative records	AR 1858, 1859, 3495 , 3496 , 3498 , 3499 , 3501 , 3573 , 3589, 9326 , 9327, 9328 , 9374 , 9380 , 9721, 9723 , 9736 Defendants' Nov. 25, 2019 Supplement Log Items 4, 5 , 5A

EXHIBIT G

From: [Ehrlich, Stephen \(CIV\)](#)
To: [Freedman, John A.](#); [Goldstein, Elena](#); DHo@aclu.org; SBrannon@aclu.org; PGrossman@nyclu.org; [Bauer, Andrew](#); [Colangelo, Matthew](#); [Saini, Ajay](#)
Cc: [Coyle, Garrett \(CIV\)](#); [Federighi, Carol \(CIV\)](#); [Kopplin, Rebecca M. \(CIV\)](#); [Halainen, Daniel J. \(CIV\)](#); [Tomlinson, Martin M. \(CIV\)](#); [Bailey, Kate \(CIV\)](#)
Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet and Confer Request
Date: Friday, August 10, 2018 10:17:56 PM

John,

With respect to the Census Rule 30(b)(6) deposition, we have questions on, and/or objections to, Topics 1-5, 11, 12, 15, 18, and 20. We may have objections or questions on other topics as we continue to review, but hopefully we can narrow, if not eliminate, any disputes concerning the proposed topics during a meet and confer. As for the designee, upon further review, we have decided to designate Dr. John Abowd as Census's sole Rule 30(b)(6) designee. Although Dr. Abowd is out of the country the week of August 20, he is otherwise generally available for deposition at a mutually convenient date. Also, it is likely that Dr. Abowd will be able to answer the vast majority of the Rule 30(b)(6) topics in his individual capacity during Wednesday's deposition.

We also wanted to respond to several issues you raised regarding our document productions after Wednesday's meet and confer. Regarding Doc # 11329, we will agree to withdraw the assertion of attorney-client privilege and produce that document with personally identifiable information redacted. Regarding your challenge to the absence in the record of early 2017 communications with Kris Kobach or Steve Bannon and between Peter Davidson and Mark Neumann, we have confirmed with our client that no additional materials on this topic exist. With regard to the issue you raised about custodians abiding by the Department's policy on use of personal devices or accounts to conduct agency matters, our preliminary understanding is that no custodians have responsive documents or communications that were not also present in their government email addresses. However, we will be in a position to give you a conclusive position on Monday.

Best,

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Trial Attorney
U.S. Department of Justice
Civil Division | Federal Programs Branch
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From: Freedman, John A. [mailto:John.Freedman@arnoldporter.com]
Sent: Thursday, August 09, 2018 9:24 PM
To: Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>; Goldstein, Elena <Elena.Goldstein@ag.ny.gov>; DHo@aclu.org; SBrannon@aclu.org; PGrossman@nyclu.org; Bauer, Andrew <Andrew.Bauer@arnoldporter.com>; Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>
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Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet and Confer Request

Stephen --

Per the August 7 email you forwarded below, the Department of Justice offered August 21 for a deposition date for the Census 30(b)(6), and advised that Mr. Jarmin would be put forward as to all topics. We met and conferred with your colleagues yesterday about the timing of Mr. Jarmin's August 21 testimony relative to Mr. Jarmin's personal testimony (which was previously noticed for August 20), and we left things that your colleagues were going to report back on our proposal to do the Census 30(b)(6) on August 20 and Mr. Jarmin in his personal capacity on August 21. As we noted, this would reduce the need for lawyers travelling from out of town to do multiple trips to DC.

At no point did your colleagues or anyone from DoJ suggest that you had objections to any of the deposition topics on the original or amended notice. We note that a substantial number of the topics on the amended notice were also identified on the original notice we served on July 20, subject to the note that we planned to supplement the topics once the Government completed its production of the Administrative Record. We also understand from what your colleagues said yesterday that upon receipt of the July 20 notice, Defendants took no steps to assess the topics or to start to prepare any witness, nor did anything else to start preparing for the 30(b)(6) deposition until the amended notice was served on August 1.

We are, of course, happy to discuss or clarify the topics. So that we can adequately prepare for the meet and confer, would you be so kind as to identify any specific topics to which you have objections, and specify what your objections are? Once we have had a chance to look into these items, we will let you know about timing on a meet and confer. As many of the topics were proposed (pursuant to the coordination procedures) by plaintiffs in the California and Maryland cases, we may need to include those counsel for discussion of specific topics.

There are also a number of other items that your colleagues promised to get back to us on today, including our proposal to do the Census 30(b)(6) on August 20 and Mr. Jarmin on August 21, an update on the DoJ production, and the questions we have raised about the gaps and improper privilege assertions in the supplemental productions. Please advise as to the status of each of those items. As we discussed yesterday, we are ready to bring each of those (and the other issues we discussed yesterday) to the Court for resolution.

Best regards,

John

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From: Ehrlich, Stephen (CIV) [<mailto:Stephen.Ehrlich@usdoj.gov>]
Sent: Thursday, August 09, 2018 2:54 PM
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zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew; Colangelo, Matthew; Saini, Ajay
Cc: Coyle, Garrett (CIV); Federighi, Carol (CIV); Kopplin, Rebecca M. (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV); Bailey, Kate (CIV)
Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet and Confer Request

Counsel,

With respect to the final Census 30(b)(6) Deposition Notice, which was served on August 2, 2018, Defendants will be prepared to meet and confer on the noticed topics on or before August 15, 2018 —*i.e.*, the noticed deposition date. We find the topics included in the Notice to be extraordinarily broad and we have a number of questions regarding the scope of certain topics. As a result, the Notice presents an undue burden on our ability to reasonably prepare the Census Bureau's designee(s). Unless and until we have agreement on scope, we are not in a position to assess the number or identity of our designee(s), appropriately prepare one or more of them to testify, or to agree to a date when such a deposition can occur. If we are unable to reach agreement as to the scope of the 30(b)(6) deposition, we are prepared to seek relief from the court.

Best,

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From: Goldstein, Elena [<mailto:Elena.Goldstein@ag.ny.gov>]
Sent: Wednesday, August 08, 2018 10:32 AM
To: Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; John.Freedman@arnoldporter.com;
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Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet and Confer Request

Counsel:

We write to (1) respond to Defendants' proposal regarding Dr. Jarmin's testimony, (2) raise questions regarding Defendants' August 7 discovery letter, and (3) serve several notices of deposition, attached.

First, with respect to point three below, we cannot agree to the schedule that you propose for Dr. Jarmin's testimony. In reliance on Defendants' prior representations regarding dates, counsel have made travel arrangements that cannot be adjusted to accommodate a deposition on August 17th. Defendants have made clear that Dr. Jarmin is available on August 20 and 21. Given that Plaintiffs have been attempting to confirm deposition dates since mid-July, it is unreasonable for Defendants to refuse to produce Dr. Jarmin on August 20 and 21. Likewise, given the parties' expert schedule, it is unreasonable to move Dr. Jarmin's deposition until September 4; Plaintiffs will not consent to extend those deadlines for the reasons previously given. Moreover, as counsel will be traveling from California for these depositions, and particularly given that Dr. Jarmin is available on consecutive days, Defendants should produce him for these dates. Plaintiffs have also made clear that we intend to take the 30(b)(6) deposition prior to the fact deposition. To the extent that Defendants are unwilling to produce Dr. Jarmin for testimony on the August 20 (as a 30(b)(6)) and 21 (as a fact deponent), Plaintiffs will seek expedited relief from the Court.

Second, with regard to the discovery letter you filed yesterday, with respect to the documents as to which Dr. Abowd believes Title 13 does not apply (as identified in para.25), kindly produce unredacted copies of those documents within 24 hours.

In addition, can you confirm that none of the documents withheld on Title 13 grounds have undergone review by the Disclosure Review Board to date? The declaration from Dr. Abowd filed with your discovery letter describes the process that the Disclosure Review Board follows, but does not assert that any of the records redacted on Title 13 grounds have undergone DRB Review. And, the document titled "DAO checklist for documents at Bates Nos. 10357-11026 in Supplemental Production – 7.3.18 Court Order – Batch 2," posted on the Commerce Department's Electronic FOIA Library at this [link](#), states that DRB Review was bypassed for these records.

Separately, can you advise as to Defendants' position regarding documents 10385, 10407, 10530, 10849, and 10913? These documents were redacted pursuant to Title 13 as per your privilege log, but are not listed in paragraph 24 of Dr. Abowd's declaration (documents that he believes are subject to Title 13), or in paragraph 25 of the declaration (documents as to which it appears the

defendants no longer assert any Title 13 protections). Before we discuss these matters with the Court, we would appreciate clarification whether you are withdrawing the Title 13 redactions as to documents 10385, 10407, 10530, 10849, and 10913.

Thank you,

Elena

Elena Goldstein | Senior Trial Counsel

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From: Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>

Sent: Tuesday, August 7, 2018 7:10 PM

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Subject: RE: State of New York v. Department of Commerce, S.D.N.Y. 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet and Confer Request

Counsel—

We are available for a meet and confer at 4:30 pm tomorrow, Wednesday, August 8th.

1. Regarding the Department of Justice production, we have collected approximately 4,000 documents and are in the process of reviewing those materials for responsiveness, relevance, and privilege. We will produce any non-privileged responsive documents as expeditiously as possible. Please note, however, that this review and all review in response to your document requests is completed by trial counsel and this review must take place alongside other obligations in this and other cases.
2. As previously indicated, Ms. Teramoto is no longer available on August 29th, but we have been able to secure availability for her on August 24th in New York City. We trust this earlier

date will be acceptable to you; please let us know as quickly as possible if that is not the case.

3. We will be designating Dr. Jarmin as the census 30(b)(6) designee. In order to allow us to reasonably prepare him to testify about the 26 broad topics you have noticed, we propose moving Dr. Jarmin's fact deposition from 8/20 to 8/17 and conducting the 30(b)(6) deposition on 8/21. It will not be possible to properly prepare Dr. Jarmin to sit on consecutive days as a fact and 30(b)(6) deponent, particularly in light of the recency of your final deposition notice. We believe this slight scheduling adjustment will best accommodate your request to move quickly to schedule the 30(b)(6) while allowing us adequate preparation time. If you are unwilling to make this modification, the 30(b)(6) deposition will need to be scheduled after Labor Day, due to Dr. Jarmin's previously scheduled vacation. Should you prefer this option, we invite you to reconsider our proposal that both sides' expert report deadlines be pushed back three weeks.
4. Please find attached Defendants' First Requests for Production.

We will address your other concerns on tomorrow's call.

Kate Bailey

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From: Freedman, John A. [<mailto:John.Freedman@arnoldporter.com>]

Sent: Monday, August 06, 2018 8:38 PM

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Cc: DHo@aclu.org; SBrannon@aclu.org; PGrossman@nyclu.org; Bauer, Andrew <Andrew.Bauer@arnoldporter.com>; Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Goldstein, Elena <Elena.Goldstein@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>

Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet and Confer Request

Counsel --

We are writing to raise several issues with regard to your communications on Friday evening, and to request a meet and confer tomorrow or Wednesday. Tomorrow we are available other than

between noon and 3. Wednesday we are available other than between 3 and 4.

1. Department of Justice Production: We received the Department of Justice production late this morning and are still reviewing. While we are reserving all of our rights, your cover letter characterized this as your “first” production. Can you confirm that we will be receiving additional responsive materials from the Department of Justice, and if so, the anticipated timing for these productions?

2. Deposition Dates

a. Department of Justice Depositions

i. John Gore: We requested that you provide dates for John Gore on July 11. On July 18, you committed to get us deposition dates for him and other witnesses “as quickly as we can.” Your communication on Friday evening that you would not be producing him is both untimely and improper. Mr. Gore’s testimony is, among other things, directly relevant to the question of whether the Commerce-orchestrated, Gore-ghostwritten request for Arthur Gary to submit is pretextual, which is relevant for both the APA and Equal Protection claims.

ii. With regard to your position regarding the Department of Justice 30(b)(6) notice, as we noted, we are evaluating the production we received earlier today. While we are reserving all of our rights, based on our preliminary review, we do not think that the production is sufficient to address the topics we identified in our notice.

And while we acknowledge your objections, we reiterate our request that you, without waiving your objections, that you provide dates of availability for Mr. Gore and your 30(b)(6) notice so that in the event the Court orders their testimony, these can proceed expeditiously.

b. Commerce/Census Depositions

i. This will confirm that we will be taking depositions of Karen Dunn Kelley on August 28 and Earl Comstock on August 30. We will issue notices later this week.

ii. With regard to Ms. Teramoto, on July 11, we requested that you provide all dates of her availability during the month of August, and you previously advised that she was available August 29, 30 or 31. We subsequently advised that we would proceed on August 29. On Friday, you advised that the only date she was available to be deposed was September 7, the date our expert reports are due. Your retraction of a previously agreed upon date in light of the quickly approaching deadlines is both untimely and inappropriate. We would suggest that you revisit this matter with your clients, or we will bring this to the Court’s attention.

iii. With regard to the Census Bureau 30(b)(6), to the extent individuals other than Messrs. Abowd or Jarmin will be designated, so that out of town counsel can plan their travel, can you please provide the potential dates when such witnesses will be made available?

3. Continuing Deficiencies in the Commerce/Census Bureau's Supplementation of the Administrative Record:

a. From our discussions during the July 31 meet and confer, we understood the Defendants would be making a supplemental production. At no point did you advise that you would be withholding almost 100 documents on the basis of a purported privilege. The Court did not authorize this untimely log, nor did we consent to it. Our position is that any privilege claim as to any document that was withheld after the Court's July 23 "no further extensions will be granted" order has been waived. These materials should be produced immediately.

b. Even had these privilege assertions been timely, there are a number of privilege assertions on the newest log that are improper on their face. For example, Defendants have withheld a second communication with Marc Neumann on the basis of attorney-client communication [11329-330]. This should be produced immediately. And there is a further work product assertion in July 2017, well before any reasonable anticipation of litigation [11317-18] -- this document should be treated consistently with the materials discussed in Judge Furman's August 4 order.

c. With regard to Mr. Uthmeier's August 11 memo, we do not understand how the failure to produce half a dozen copies of this document [11306, 11342, 11346, 11353, 11363, 12464] can be considered "inadvertent," particularly in light of the Government's insistence during the July 31 meet and confer that it was included in prior productions. This should also be produced immediately.

d. As we noted during the July 31 meet and confer, there continue to be significant gaps in the Administrative Record.

i. We raised specific concerns during the call about the lack of materials prior to December 12, 2017 (as well as prior to May 1, 2017) involving Secretary Ross, Ms. Teramoto, Ms. Alexander, and Messrs. Comstock, Branstad, Hernandez, and Uthmeier.

During the call, you confirmed that you had inquired into whether relevant materials would be found in Secretary Ross' personal emails, and you agreed to inquire whether the six other officials engaged in communications about this topic through means other than their government emails, e.g., personal emails, text, messaging apps or personal devices, or voicemails. We are still waiting for a report back.

ii. The supplemental production has done nothing to address the gaps in the Administrative Record with regard to the questions we raised concerning Secretary Ross, Ms. Teramoto, Ms. Alexander, and Messrs. Comstock, Branstad, or Hernandez. While the supplemental production does address some of our concerns regarding Mr. Uthmeier, it is apparent that certain of his materials still have not been produced and are not otherwise reflected on any log. For example, we have not

found the “review materials” Uthmeier prepared on or around September 5, 2017 [AR 1996-1999], nor do we see any notes or other evidence of his or Peter Davidson’s engagement with Marc Neumann on or around September 8 and October 8, 2017 [AR 2051_001, 2497].

iii. During the July 31 call, we specifically noted the lack of documents reflecting the engagement of either the Departments of Homeland Security or Justice (as referenced in AR 2458 & 9834) as well as key third parties, including Steve Bannon (as referenced in AR 2561 & 763), Kris Kobach (as referenced in AR 763), and Marc Neumann (as referenced in 3699). The new production did not cure these issues.

Additionally, while it is clear that there was stakeholder engagement with Messrs. Kobach and Neumann during the stakeholder engagement process [AR 1141, 1815, 3421, 3491] unlike virtually every other contact during that time, there are no file memos or follow up acknowledgments regarding these contacts.

Each of these issues should be cured immediately.

Please advise when you will be available on Tuesday or Wednesday to meet and confer regarding these issues.

John

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EXHIBIT H

From: [Bailey, Kate \(CIV\)](#)
To: [Freedman, John A.](#); [Goldstein, Elena](#); DHo@aclu.org; SBrannon@aclu.org; PGrossman@nyclu.org; [Bauer, Andrew](#); [Colangelo, Matthew](#); [Saini, Ajay](#)
Cc: [Coyle, Garrett \(CIV\)](#); [Federighi, Carol \(CIV\)](#); [Kopplin, Rebecca M. \(CIV\)](#); [Halainen, Daniel J. \(CIV\)](#); [Tomlinson, Martin M. \(CIV\)](#); [Ehrlich, Stephen \(CIV\)](#)
Subject: Two outstanding items
Date: Wednesday, August 15, 2018 2:55:54 PM

Counsel—

We write to provide updates on two issues you recently have raised.

First, you asked whether DOJ will be providing any of the expert reports prepared for litigation by the Civil Rights Division, as referenced in the R&Os to your Rule 45 subpoena. We have confirmed that we will be producing expert reports.

Second, we have received verbal affirmation from the custodians searched for the supplemental materials produced in response to the Court's July 3, 2018 order that they each adhered to the Department of Commerce Policy regarding personal email use. Specifically, custodians confirmed that they are aware of and adhere to the Department's policy that government business be conducted over government email. Pursuant to that policy, DOC employees are instructed to copy or forward to government email addresses any government communications sent or received from personal email addresses.

We trust this addresses your concerns.

Best,

Kate Bailey
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